UNITED STATES
v.
VIEW POINT RANCHES

IBLA 76-767 Decided October 31, 1978

Appeal from decision of Administrative Law Judge E. Kendall Clarke setting aside the decision of the District Manager, Prineville Grazing District, Oregon. OR-05-75-01.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Federal Range Code

A decision made under 43 CFR 4.470 et seq. regarding future use of the Federal Range will be set aside if it is necessary that issues involved therein be considered under regulations newly promulgated pursuant to Federal Land Policy and Management Act of 1976.

APPEARANCES: Lawrence E. Cox, Esq., Assistant Regional Solicitor, Portland, Oregon, for Bureau of Land Management; Robert L. Nash and Owen M. Panner, Esqs., Panner, Johnson, Marceau, Karnopp & Kennedy, Bend, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The Government appeals the decision of Administrative Law Judge E. Kendall Clarke setting aside and remanding decision OR-05-75-01 of the Bureau of Land Management's District Manager, Prineville Grazing District, Oregon. The applicable law is set forth in the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315 et seq. (1970), further amended in 43 U.S.C.A. §§ 1751-53 (West Supp. 1977).

Facts

View Point Ranches is a large ranching operation using a unified area of Federal range which straddles the boundary line between the Prineville and Lakeview Grazing Districts in Oregon. From at least 1968 to late 1975, BLM recognized View Point's two-district area of use as exclusive, although no formal exclusive allotment or rangeline agreement was ever executed, 1/ and although several others were granted temporary privileges in years in which View Point's predecessors in interest 2/ applied for nonuse. On January 23, 1973, View Point was advised by a joint decision of the Lakeview and Prineville District Managers that its grazing privileges were to be 32,657 AUMs active use and 5,000 AUMs suspended nonuse in Lakeview, and 5,223 AUMs active use in Prineville. On March 3, 1975, View Point requested an allowance of 8,140 active AUMs for that part of its area of use located in the Prineville District, or some 3,000 AUMs over its theretofore recognized privileges in that district. Viewpoint claims that additional forage in Prineville is available due to its efforts. By decision of March 10, 1975, the Prineville District Manager granted View Point its original 5,223 AUMs active use, but denied its request to the extent of the additional privileges asked. Under 43 CFR 4.470 et seq., View Point appealed this rejection to the Administrative Law Judge, whose decision to remand is herein appealed by the Bureau of Land Management. As to the District Manager's decision, the Administrative Law Judge held:

> [I]t fails to consider such relevant factors as shortages of grazing in the Lakeview District and the de facto nature of the View Point Ranches' exclusive use of the ZX Allotment in the Prineville District. It does not take into consideration that most of the increases in AUM's was attributable to efforts of View Point Ranches. It does not show that any other grazing licensees within the Prineville District have any superior rights to the increased forage available in the ZX Allotment. * * * It fails to make a genuine attempt to work out a management scheme between two Bureau of Land Management Districts so that the ranching operation which straddles an arbitrary division between the Districts can be properly managed to the benefit of the federal lands. It fails to take into consideration the basic purposes of the Taylor Grazing Act, to stabilize livestock operations and to conserve and regulate public grazing land.

1/ 43 CFR 4111.3-2(c) (1977).

2/ View Point acquired the base property involved in April 1972.

Regarding the increased available forage in the Prineville ZX Allotment, 3/ on appeal BLM has stated that "[a]ll the suspended non-use * * * had a superior right * * *." No factual data has been cited to show specific grazers who have superior rights and who are in a position to exercise such rights.

Nature of Relief in Issue

The parties agree that View Point will continue to enjoy its established 5,223 AUMs in Prineville. View Point's request for the additional AUMs in its area of use in the Prineville District was founded upon its assertion that they were needed to compensate for its loss through natural processes of actual forage within its area in Lakeview District. Because of certain favorable conditions, the range within the ZX Allotment in Prineville has produced a greater amount of forage than had been anticipated, and View Point's application is for use of a portion of this increase in available AUMs. A 1974 range survey established that the range would support 9,492 AUMs within the ZX Allotment, while a 1972 amended survey--the latest survey at the time View Point's privileges were set out in the January 23, 1973, decision, supra--showed that area to support 6,846 AUMs. View Point emphasizes that it has no desire to gain an increase over its established 37,880 AUMs total active use from the ZX Allotment and its Lakeview area. Rather, View Point describes the relief sought:

> [W]hen a forage imbalance develops so that there are shortages in one areaand surpluses in another, especially where the surplus is in an exclusive use allotment, View Point ought to be allowed to reduce its use in the shortage area and make up the difference in the surplus area in order to maintain a stable operation and an orderly use of the federal range.

Brief for Appellee at 12-13. View Point prays that "the district managers should reestablish a cooperative management approach, recognizing View Point's situation as an inter-district operation," in order that the purposes advanced in the grazing statutes and regulations might be accomplished. Id. at 23.

It is undisputed that there is a substantial doubt, because of the failure of certain grass seedings to produce anticipated forage, that View Point will fully realize the use of the approximately

32,000 AUMS to which it is entitled in its Lakeview area. 4/ Nor is it disputed that there are some 21,000 AUMs of Class I privileges in suspended nonuse held by other operators within the Prineville District.

View Point's purpose is not limited to the acquisition in Prineville of supplemental, or nonrenewable, privileges for the 1975 grazing season under 43 CFR 4115.2-1(i). In its protest, filed April 4, 1975, to the Prineville District Manager's March 10, 1975, denial of its request, View Point's General Manager made it clear that its goal with respect to the increased forage in the five pastures comprising the ZX Allotment is long term in character. The Government on appeal notes that this "dispute arises out of the desire of View Point to use privileges applicable to the Lakeview District in the Prineville District." Brief for Appellant at 6. 5/

Since View Point presently has use of the full 5,223 AUMs in Prineville which View Point's predecessors were granted upon their base properties in that District, we interpret View Point's application for the additional AUMs in Prineville as a request that it be allowed to exercise in Prineville a fraction of its Class I active privileges which have been established upon base properties in the Lakeview District. 6/

4/ E.g., the testimony of Edwin DePoali, High Desert Area Manager, Lakeview District, Tr. 83-85.

5/ The Government detailed the history of the View Point qualifications at page 6 of its appeal brief:

"All base property currently used to establish commensurability lies within the geographic area encompassed by the BLM's Lakeview District (Tr. 6). Although the base now used for commensurability lies entirely within the Lakeview District, the privileges were established under the range code on lands located within the Lakeview and Prineville Districts (Tr. 131).

"View Point's base property qualifications within the Prineville District were originally based upon ownership or control of lands within the boundaries of the Prineville District (Joint Stipulation, paragraph 4)."

In the Joint Stipulation filed at the hearing, the parties agreed that the "qualifications for the 5,223 AUMs of active use within the Prineville District were originally based on land ownership and control of leased land within the boundaries of the Prineville District."

6/ There is some confusion in the record as to the exact nature of the relief asked by View Point. At page 12 of its appeal brief, the Government contends that View Point's application is for transfer of base property qualifications between districts. It appears that this was also the interpretation of the Prineville District Manager (Tr. 131). However, we note that View Point in its briefs and at the

Arguments

The rationale for the denial of View Point's request was given in testimony at the hearing. 7/ Paul W. Arrasmith, Prineville District Manager, summarized:

> I feel from the policy in the manual, the regulatory guidelines and the way grazing districts were established, pursuant to the Taylor Grazing Act, that our first obligation is to satisfy the Class I privileges of operators within the district.
>
> * * * * * * *
>
> We were proposing two things at that point in time: a consideration of moving the livestock use from a critical water shed, a highly eroded situation in the Bear Creek area that Mr. Ryan has already testified about; and, over the long term a consideration of being able to reestablish or reallocate some Class I suspended non-use privileges to other operators within the Prineville District [to bring them] * * * to active use.

(Tr. 133-34). Bear Creek is within the Prineville District about 20 miles from the ZX Allotment.

On appeal, BLM argues that the doctrine of administrative finality, as codified at 43 CFR 4.470 for grazing cases, and the 3-consecutive-year limitation on readjudication given in former section 43 CFR 4115.2-1(e)(13)(i) bar reconsideration of the January 23, 1973, joint District Managers' decision setting View Point's Prineville entitlement at 5,223 AUMs; and that the Administrative Law Judge erred in determining that the action of the Prineville District Manager was arbitrary. The BLM supports the latter contention by citing the priority of activating the AUMs in suspended nonuse held by other operators in Prineville and of mitigating the Bear Creek problem, as well as by urging that "the rationale of the [Administrative Law Judge's] decision * * * would subvert the entire basis of range allocation under the Taylor Grazing Act." 8/

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fn. 6 (continued)
hearing has never mentioned an interest in formal transfer of qualifications. Rather, in its desire for an interdistrict license and in other statements in the record, View Point shows that its interest is not in the location of the base properties upon which are founded its qualifications, but in where the privileges for which its qualifications have been established are exercised.

7/ Tr. 119-20, 124-125, 130-38.

8/ The Government also raised a mootness argument with respect to the supplemental privileges issue.

View Point disputes the procedural arguments raised by BLM and backs its contention that the Administrative Law Judge ruled properly with arguments going to the point that sound range management and conservation and stabilization of the livestock industry demand that the relief View Point seeks be granted. View Point cites, e.g., United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972).

It was not immediately clear from the regulations as to what law should have been applied by the District Manager and Administrative Law Judge. However, in accordance with the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1751 et seq. (Supp. 1978), Departmental regulations 43 CFR Part 4100 were substantially revised effective August 4, 1978. 43 FR 29058. Any adjustment of grazing privileges would be governed by the new regulations.

Decisions as to the substantial issues herein under the new regulations should be made initially by the two District Managers, and View Point should have the opportunity to present its view on the impact of such new regulations. It is accordingly necessary to remand the case to the Prineville District Manager, who may consider the matter jointly with the Lakeview District Manager. View Point may desire to amend its application for consideration under the new regulations and also make application to the Lakeview District in connection with the adjustment requested.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from and the decision of the Prineville District Manager are vacated and the case is remanded to the Prineville District Manager for further consideration.

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Joseph W. Goss
Administrative Judge

I concur:

_____
Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I believe the District Manager's decision was proper when it was made and disagree with certain reasons given by the Administrative Law Judge for remanding the case. To the extent the appeal raised issues concerning past grazing seasons for supplemental use privileges, the appeal is moot. I believe the appeal is moot also because of the changes in the regulations. If appellant desires to have a transfer of any of his grazing preference right, I believe he should file a new appropriate application under the new regulations. Therefore, I agree with Judge Goss' decision to the extent it implies that consideration of a new application should not be precluded because of the prior decisions in this case.

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Joan B. Thompson
Administrative Judge